Supreme Court, U.S.
FILED
DEC 12 2003
OFFICE OF THE CLERK

No. 02-1824

In the

Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

MICHAEL WAYNE HALEY,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF THE STATES OF ILLINOIS, ALABAMA, ARIZONA, MISSISSIPPI, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, OREGON, SOUTH DAKOTA, UTAH, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN
Solicitor General of Illinois
LINDA D. WOLOSHIN
* DOMENICA A. OSTERBERGER
Assistant Attorneys General
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-8812

Of Counsel:
Dan Schweitzer
National Association of
Attorneys General
750 First St., N.E.
Washington, D.C. 20002
(202) 326-6010

* *Counsel of Record*

[additional counsel listed on inside cover]

BILL PRYOR
Attorney General of Alabama
State House
11 South Union Street
Montgomery, AL 36130

TERRY GODDARD
Attorney General of Arizona
1275 West Washington
Phoenix, AZ 85007

MIKE MOORE
Attorney General of
Mississippi
P.O. Box 220
Jackson, MS 39205

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

JON BRUNING
Attorney General of
Nebraska
Department of Justice
2115 State Capitol
Lincoln, NE 68509

JIM PETRO
Attorney General of Ohio
State Office Tower
30 East Broad St.
Columbus, OH 43215

W. A. DREW EDMONDSON
Attorney General of
Oklahoma
2300 N. Lincoln Boulevard
Suite 112
Oklahoma City, OK 73105

HARDY MYERS
Attorney General of Oregon
1162 Court Street, NE
Salem, OR 97301

LAWRENCE E. LONG
Attorney General of South
Dakota
500 East Capitol Avenue
Pierre, SD 57501

MARK L. SHURTLEFF
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114

PATRICK J. CRANK
Attorney General of
Wyoming
123 State Capitol
Cheyenne, WY 82002

QUESTION PRESENTED

Whether the "actual innocence" exception to the procedural default rule for federal habeas corpus claims should apply to noncapital sentencing error.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. The Procedural Default Of A Claim Of Noncapital Sentencing Error On Habeas Corpus Review Cannot Be Excused Under The "Fundamental Miscarriage Of Justice" Exception To Default By A Showing Of "Actual Innocence" Of The Sentence 7

A. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), And Its Progeny Teach That This Court Has Never Held That "Actual Innocence" Of A Sentence Can Excuse The Procedural Default Of A Sentencing Error 7

B. Extending The "Fundamental Miscarriage Of Justice" Exception To Defaulted Claims Of Sentencing Error Upon A Showing Of "Actual Innocence" Of The Sentence Is Unwarranted. 11

C. To The Extent That "Actual Innocence" Of A Sentence Can Excuse The Default Of A Sentencing Error, The Exception Should Be Limited To Capital Cases ... 13

II. A Showing Of "Actual Innocence" Must Be Premised On Newly Discovered Evidence, A Standard Haley Cannot Meet 16

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES:

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 10
Apprendi v. New Jersey, 530 U.S. 466 (2000) *passim*
Bannister v. Delo, 100 F.3d 610 (8th Cir. 1996) . 20
Beck v. Alabama, 447 U.S. 625 (1980) 14
Bousley v. United States, 523 U.S. 614 (1998) .. 18
Bullington v. Missouri, 451 U.S. 430 (1981) 14
Burks v. Dubois, 55 F.3d 712 (1st Cir. 1995) 19
Calderon v. Thompson, 523 U.S. 538 (1998) 9, 18, 19, 21
Coleman v. Thompson, 501 U.S. 722 (1991) ... 4, 5
Engle v. Isaac, 456 U.S. 107 (1982) 5
Fay v. Noia, 372 U.S. 391 (1963) 4, 5
Glover v. United States, 531 U.S. 198 (2001) ... 14
Gomez v. Jaimet, No. 02-4372, 2003 WL 22805702 (7th Cir. Nov. 26, 2003) 20
Herrera v. Collins, 506 U.S. 390 (1993) ... 6, 19, 22
Kimmelman v. Morrison, 477 U.S. 365 (1986). 14, 15
Kuhlmann v. Wilson, 477 U.S. 436 (1986) 6, 18, 21
McCleskey v. Zant, 499 U.S. 467 (1991) 19, 20
Monge v. California, 524 U.S. 721 (1998) ... 10, 14
Murray v. Carrier, 477 U.S. 478 (1986) ..... *passim*
O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 4

Pickens v. Lockhart, 4 F.3d 1446 (8th Cir. 1993). 20
Ring v. Arizona, 536 U.S. 584 (2002) ..... *passim*
Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) 8, 9, 14
Sawyer v. Whitley, 505 U.S. 333 (1992) ..... *passim*
Schlup v. Delo, 513 U.S. 298 (1995) ..... *passim*
Smith v. Murray, 477 U.S. 527 (1986) . 9, 12, 13, 16
Sweger v. Chesney, 294 F.3d 506 (3rd Cir. 2002). 19
United States v. Mikalajunas, 186 F.3d 490 (4th Cir. 1999) 13, 16
Wainwright v. Sykes, 433 U.S. 72 (1977) ... 4, 5, 16
Williams v. State, 899 S.W.2d 13 (Tex. Ct. App. 1995) 17

STATUTES:

28 U.S.C. §2244(b)(2)(B)(i) 3, 21
28 U.S.C. §2244(b)(2)(B)(ii) 22
28 U.S.C. §2254(b)(1) 4
Tex. Penal Code §12.42(a)(2) 17

OTHER AUTHORITY:

Friendly, J., *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) 6, 18

INTEREST OF THE AMICI CURIAE

This case presents the question whether the "fundamental miscarriage of justice" exception to procedural default on federal habeas review is available to a petitioner who demonstrates "actual innocence" of his noncapital sentence. The procedural default doctrine, which is rooted in principles of comity and federalism, reflects the respect of the federal courts for state procedural rules. Further, the litigation of substantive habeas corpus claims in the federal courts taxes state resources and delays the final resolution of state criminal convictions. The States have a substantial interest both in enforcing their procedural rules and in obtaining finality to their criminal prosecutions. Any expansion of the exception to procedural default, such as that at issue in this case, runs contrary to these substantial state interests.

SUMMARY OF ARGUMENT

Principles of comity and federalism dictate that, in the ordinary case, a habeas corpus petitioner may avoid his procedural default of a claim only by showing cause and prejudice. Out of concern that the victim of a fundamental miscarriage of justice might not meet the cause and prejudice standard, this Court crafted the "actual innocence" exception to the procedural default rule. A petitioner can use actual innocence as a gateway to the review of a procedurally defaulted claim if newly discovered evidence not available at trial shows that a petitioner is actually innocent of the crime or shows that he was not eligible for a sentence of death. *Schlup v. Delo,* 513 U.S. 298 (1995); *Sawyer v. Whitley*, 505 U.S. 333 (1992). This Court has never held that a petitioner may overcome the procedural default of a claim of noncapital sentencing error by

proving "actual innocence" of a noncapital sentence. It should not do so in this case.

I. This Court's recent decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), teach that the determination of eligibility for a death sentence is not part of a sentencing proceeding—it is a trial on a "greater" capital offense. This means the Court has never held that actual innocence of a sentence is available to excuse default in *any* sentencing context, much less in a noncapital case. The policy reasons underlying the actual innocence exception dictate that the exception not be extended to sentencing proceedings.

Most importantly, there is a "significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence." *Schlup*, 513 U.S. at 326, n.44. Indeed, it is counterintuitive even to think of a petitioner as being "innocent" of a sentence. Moreover, expanding the actual innocence exception to sentencing error would undermine the Court's oft-stated belief that the exception be applied only in the "extraordinary case." *See, e.g., Murray v. Carrier*, 477 U.S. 478, 496 (1986). Finally, expanding the actual innocence exception to noncapital sentencing error would run afoul of the Court's concern that actual innocence not amount to "little more" than the showing of prejudice needed to justify "habeas relief for many constitutional errors," and that it not undermine the requirement that a petitioner show the requisite cause to excuse procedural default. *Sawyer*, 505 U.S. at 345.

Even if, notwithstanding *Apprendi* and *Ring*, this Court considers *Sawyer* to have authorized claims of "actual innocence" of the *sentence* of death, the use of actual innocence to excuse the default of sentencing error should not move beyond the capital context. Through a long line of cases, this Court has applied greater procedural protections to death penalty proceedings than to noncapital sentencing proceedings, and has compared capital proceedings to trials on guilt or innocence. The distinctions drawn in this "death is different" jurisprudence instruct that, while a claim of actual innocence of death may be necessary to prevent a "fundamental miscarriage of justice," the same is not true as to a noncapital sentence.

II. Haley's claim of actual innocence fails for another, independent reason. This Court has stated that claims of actual innocence must be premised on new evidence that was not presented at trial. It follows that the evidence upon which an actual innocence claim is premised must also not have been previously available to a petitioner exercising due diligence. It would be inconsistent with the comity and federalism interests in finality if the rule were otherwise. Further, the AEDPA provision addressing successive habeas petitions contains a new evidence/due diligence requirement. 28 U.S.C. §2244(b)(2)(B)(i). Actual innocence claims offered to excuse default and actual innocence claims offered as an excuse to proceed with a successive petition have historically been reviewed under the same standards by this Court, and there is no reason for disparate treatment today. Haley's claim is based on evidence that was available to him at trial; indeed, it was

presented at trial. He therefore cannot avail himself of the actual innocence exception.

ARGUMENT

The "actual innocence" exception is a narrow exception to the general rules governing the default of claims by habeas corpus petitioners. Principles of comity and federalism underlie the requirement that a habeas corpus petitioner exhaust his claims in state court before turning to the federal system for relief. When a state court is given the first opportunity to correct a constitutional error that occurred at a petitioner's trial, any friction that might result from a federal habeas court overturning the decision of its state counterpart is reduced. *See* 28 U.S.C. §2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). These principles likewise call for the habeas court to find a claim to be procedurally defaulted when the state court has disposed of it on an independent and adequate state procedural ground. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). Because the existence of an independent and adequate state ground on direct review deprives this Court of jurisdiction to review a state court's judgment, the state-law ground must also be respected on collateral review, lest habeas review provide a petitioner with an "end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." *Id.* at 731.

Procedural default may be excused, but comity and federalism also inform this area of law. In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court stated that the cause and prejudice standard governs whether a habeas claim can elude default. The Court abandoned the deliberate bypass standard utilized in *Fay v. Noia*,

372 U.S. 391 (1963), which had essentially given precedence to a petitioner's claims over a State's interest in its procedural rules, and limited *Fay* to its facts. *Sykes*, 433 U.S. at 88-90. The cause and prejudice standard gives "greater respect" to state rules. *Coleman*, 501 U.S. at 747.

In *Sykes*, this Court stated that the cause and prejudice standard assures that the procedural default rule "will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication *will be the victim of a miscarriage of justice*." *Sykes*, 433 U.S. at 91 (emphasis added); *see also Engle v. Isaac*, 456 U.S. 107, 135 (1982) (the Court is "confident" that a claim involving a fundamental miscarriage of justice will meet the cause and prejudice standard). In *Murray v. Carrier*, 477 U.S. 478, 496 (1986), the Court reasserted the above statement, but acknowledged that "we do not pretend that this will always be true." Therefore, "in an extraordinary case, *where a constitutional violation has probably resulted in the conviction of one who is actually innocent*, a federal habeas court may grant the writ" despite a procedural default, even in the absence of cause and prejudice, lest a fundamental miscarriage of justice occur. *Id.* (emphasis added).

Since *Carrier*, the fundamental miscarriage of justice exception has been "explicitly tied . . . to the petitioner's innocence." *Schlup v. Delo*, 513 U.S. 298, 321 (1995). Two lines of inquiry have developed—one pertaining to claims of innocence of the offense, and one pertaining to claims of ineligibility for the death penalty. In the former category, the standard applied in *Carrier*—whether it is more likely than not that no

reasonable juror would have convicted the petitioner in light of the new evidence—guides the habeas court. *Schlup*, 513 U.S. at 327-28. In the latter category, a stricter standard applies: whether the petitioner has shown by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty. *Id.* at 323; *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). Under either standard, the court is to consider all the available evidence—both new evidence and evidence that was presented at trial—with due regard to relevant reliability concerns. *Kuhlmann v. Wilson*, 477 U.S. 436, 454, n.17 (1986) (Opinion of Powell, J.) (citing Friendly, J., *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970)) (hereafter "Friendly, J."). A claim of actual innocence in a habeas case is useful only as a "gateway" to the consideration of an otherwise defaulted claim. Independent claims of actual innocence premised on newly discovered evidence are generally not cognizable on habeas review. *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

The court below held that Haley may use the actual innocence exception as a basis for excusing his default of a claim asserting a noncapital sentencing error. That judgment should be reversed for two reasons. First, the principles underlying the actual innocence exception would not be served by extending it to "innocence" of a noncapital sentence. Second, the actual innocence exception does not properly apply where—as here—the claim of actual innocence is premised on evidence that was available at trial to the petitioner.

I. The Procedural Default Of A Claim Of Noncapital Sentencing Error On Habeas Corpus Review Cannot Be Excused Under The "Fundamental Miscarriage Of Justice" Exception To Default By A Showing Of "Actual Innocence" Of The Sentence.

The court of appeals seized on the notion of "actual innocence" of eligibility for a death sentence and applied it to the context of habitual offender sentencing, reasoning that Haley should be excused from the default of a sentencing claim because he showed that he was in fact ineligible to receive an extended sentence. Pet. App. 17a. But the analogy drawn by the court of appeals was inapt. This Court's recent precedent confirms that it has never actually held that "actual innocence" of a sentence can overcome procedural default. And, given the difference between the equity concerns present when an erroneous conviction is alleged and when sentencing error is alleged, this Court should not extend the actual innocence exception to sentencing error. Finally, even if a habeas petitioner can claim "actual innocence" of a sentence, such claims should be limited to capital cases.

A. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), And Its Progeny Teach That This Court Has Never Held That "Actual Innocence" Of A Sentence Can Excuse The Procedural Default Of A Sentencing Error.

In *Sawyer*, the Court rejected the suggestion that a defendant is "actually innocent" of the death penalty if he can show that "there is a 'fair probability' that" the death sentence was imposed because "constitutional error kept true mitigating evidence

from the jury." 505 U.S. at 343-44 (internal citations omitted). Instead, the Court held that a defendant can use the gateway of "actual innocence of the death penalty" only if he can show innocence of the "elements of the crime itself" or innocence of the statutory aggravating factors which qualified him for the death penalty. *Id.* at 344-45. It is now clear, in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), that the standard adopted in *Sawyer* looked to the innocence of the underlying capital offense, not innocence of a sentence (or sentencing factor).

In *Apprendi*, the Court held that the existence of a fact that increases the maximum penalty available for an offense is an element of the offense subject to the Sixth Amendment guarantee of a jury trial and the due process requirement of proof beyond a reasonable doubt. 530 U.S. at 490. In *Ring*, the Court relied on *Apprendi* to hold that the existence of an aggravating factor that renders a defendant eligible for the death penalty is also an element of an offense that must be proved to the trier of fact beyond a reasonable doubt. 536 U.S. at 609.

Justice Scalia, joined by two members of the Court, has observed that *Apprendi* and *Ring* "illuminated" the Court's jurisprudence with respect to identifying the true nature of capital sentencing proceedings. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (opinion of Scalia, J.) (double jeopardy does not bar the imposition of the death penalty when the guilt finding at the first trial, at which the jury deadlocked as to the imposition of death and life was imposed by default, is reversed). The four dissenting Justices in *Sattazahn* likewise viewed *Apprendi* and *Ring* as teaching that

the finding of an aggravating factor authorizing the imposition of death is part of a trial on the offense itself. *Id.* at 126, n.6 (Ginsburg, J., dissenting).

In *Sawyer*, 505 U.S. at 339-40, and *Smith v. Murray*, 477 U.S. 527, 537 (1986), this Court attempted to identify what constitutes actual innocence of a death sentence. With the benefit of hindsight, and in light of *Apprendi, Ring, and Sattazahn*, it becomes apparent that this effort did not result in an extension of the actual innocence exception to sentencing proceedings. Rather, the Court identified the standards by which to assess the issue of actual innocence of "an element of a greater [capital] offense." *Ring*, 536 U.S. at 609.[1]

Here, Haley cannot rely on *Apprendi* or *Ring* to claim that he has demonstrated actual innocence of the offense. Haley's claim of innocence is that he was not sequentially convicted of two prior felony offenses. J.A.

---

[1] Eventually, this Court may be called upon to decide whether justification for the different standards of review for actual innocence of the offense and actual innocence of death still exists in light of *Apprendi* and *Ring*. A related issue was presented in *Calderon v. Thompson*, 523 U.S. 538, 559 (1998), where the petitioner was convicted of rape and murder, and the rape conviction was used to qualify him for a death sentence for the murder. The petitioner sought to show both actual innocence of rape under the *Carrier/Schlup* standard, and actual innocence of rape as a sentencing enhancer, a claim subject to the more stringent *Sawyer* standard. The Court noted the "tension" between *Schlup* and *Sawyer*, in that "[i]t would be possible to vacate [the petitioner's] stand-alone conviction of rape but to let stand his conviction of murder and sentence of death." *Calderon*, 523 U.S. at 560. But the Court declined to address the anomaly, finding that the petitioner failed to meet his burden under either standard. *Id.* The instant case, likewise, does not present this Court with an opportunity to resolve that tension.

42, 47, 52-58, 61-62. In *Apprendi*, however, this Court expressly declined to hold that the jury trial guarantee and the due process requirement of proof beyond a reasonable doubt apply to the proof of a prior conviction used to enhance a sentence, reasoning that adequate constitutional protection is provided when a prior conviction is received. 530 U.S. at 488. The Court thus affirmed the continuing validity of *Almendarez-Torres v. United States*, 523 U.S. 224, 241 (1998), which held that Congress did not violate the Constitution in labeling as a sentencing factor, rather than as an element of the offense, the existence of a prior crime authorizing the imposition of a lengthier sentence.[2] Therefore, in order for Haley's actual innocence claim to succeed, this Court must, for the first time, find that actual innocence of a sentence—a noncapital sentence—constitutes a fundamental miscarriage of justice such that procedural default may be excused.

[2] It is immaterial, for purposes of concluding that prior convictions are sentencing factors (not elements) under Texas' habitual sentencing scheme, that Texas requires the prior convictions to be sequential. In *Monge v. California*, 524 U.S. 721 (1998), this Court found *Almendarez-Torres* fully applicable to California's recidivism statute, notwithstanding that the State must prove not only the commission of prior offenses, but certain facts regarding those offenses that do not necessarily appear on the face of the record. *Monge*, 524 U.S. at 728-29; *id.* at 740-41 (Scalia, J., dissenting) (acknowledging that treating "enhancement findings" under California's statute as elements of the offense would "contradict" the holding of *Almendarez-Torres*).

B. Extending The "Fundamental Miscarriage Of Justice" Exception To Defaulted Claims Of Sentencing Error Upon A Showing Of "Actual Innocence" Of The Sentence Is Unwarranted.

The policy concerns expressed in this Court's actual innocence jurisprudence counsel against extending the fundamental miscarriage of justice exception to claims of actual innocence of a sentence. The comity and federalism interests underlying the cause and prejudice standard dictate that the actual innocence exception applies only in the "extraordinary case." *Carrier*, 477 U.S. at 496. "Innocence" of a particular sentence does not constitute such a case.

In *Schlup*, the Court outlined the reasons why a claim of actual innocence of eligibility for a death sentence—now better viewed as actual innocence of the "greater" offense of capital murder—is subject to stricter scrutiny than a claim of actual innocence of the underlying conviction, or the "lesser" offense. Equity considerations, upon which the fundamental miscarriage of justice exception is based, are more compelling in a case in which guilt of the offense is at issue than in a case in which a petitioner is "alleging that his sentence is too severe." *Schlup*, 513 U.S. at 325. Simply put, there is a "significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence." *Id.* at 326, n.44.

In addition, the Court in *Schlup* observed that claims of actual innocence of the offense are rarer than challenges to the propriety of a death sentence, claims that are "routinely asserted in capital cases." 513 U.S. at 324. As such, claims of actual innocence of the

offense are less offensive to finality and comity, and present less of a drain on judicial resources. *Id.* Though *Apprendi* and *Ring* clarified that claims of eligibility error are actually claims regarding guilt, the distinctions drawn in *Schlup* remain valid. A claim of actual innocence of a sentence is simply less compelling than a claim of actual innocence of the offense.

Moreover, this Court has recognized that "the concept of 'actual' innocence, distinct from 'legal' innocence, does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Smith*, 477 U.S. at 537. Surely it is no easier to translate the concept of actual innocence into the context of an alleged error regarding a sentence of a term of years. It is counterintuitive to think of someone being "innocent" of a sentence.

Finally, the Court has expressed concern that actual innocence not amount to "little more" than the showing of prejudice needed to justify "habeas relief for many constitutional errors," and that it not undermine the requirement that a petitioner show the requisite cause to excuse procedural default. *Sawyer*, 505 U.S. at 345. These concerns would be invariably present in the context of noncapital sentencing proceedings.

If this Court were to hold that a habeas petitioner can assert actual innocence of a sentence to overcome procedural default, such claims would presumably focus on a petitioner's eligibility for his sentence, since this Court focused on eligibility factors when fashioning a standard to assess claims of innocence of death. *See id.* at 344-45. Further, the actual innocence of a sentence claim would typically be identical to the procedurally defaulted claim. Thus, the actual innocence claim would be a means of

avoiding the cause requirement for overcoming procedural default. The petitioner could obtain habeas relief based on a finding of prejudice alone. The showing of actual innocence would become virtually the equivalent of the underlying, routine habeas claim—which this Court plainly considers to be unextraordinary. This case illustrates this problem perfectly. Once it found that Haley's actual innocence of his sentence removed the barrier of procedural default, the court of appeals was compelled to conclude that he was entitled to relief. Pet. App. 17a-20a.

C. To The Extent That "Actual Innocence" Of A Sentence Can Excuse The Default Of A Sentencing Error, The Exception Should Be Limited To Capital Cases.

Should this Court decline to find that *Apprendi* and *Ring* have affected actual innocence jurisprudence, the actual innocence of a sentence exception should be limited to capital cases. Indeed, this Court has never considered the exception with respect to a noncapital sentence. And when the Court has discussed actual innocence of a sentence, it has done so with an eye toward preventing the execution of one who is "innocent of death." *Sawyer*, 505 U.S. at 341; *see also Smith*, 477 U.S. at 527.

The "actual innocence of death" exception is distinct from—and should not be extended to—an "actual innocence of a noncapital sentence" exception for two fundamental reasons. First, this Court's Eighth Amendment jurisprudence was the backdrop of its development of the framework for assessing claims of actual innocence of death. *Sawyer*, 505 U.S. at 341-44. The Court has repeatedly recognized that the gravity of capital punishment necessitates additional

procedural safeguards as compared to proceedings involving lesser penalties. For example, in *Monge v. California*, 524 U.S. 721, 732 (1998), the Court rejected a claim that *Bullington v. Missouri*, 451 U.S. 430 (1981), compelled the conclusion that double jeopardy barred a new sentencing proceeding in a "three strikes" case. The Court distinguished *Bullington* because its "capital sentencing context" was "a critical component" of the Court's reasoning in that case. *Monge*, 524 U.S. at 731; *see also Beck v. Alabama*, 447 U.S. 625 (1980) (there is a heightened concern for reliability in the guilt phase of death penalty cases). Indeed, the Court has compared death penalty proceedings to trials on guilt or innocence, *see Sattazahn*, 537 U.S. at 109—a comparison the Court, quite properly, has not made with respect to ordinary, noncapital sentencing hearings.

The "death is different" principle is firmly ingrained in the Court's jurisprudence and explains why the Court entertains claims of actual innocence of death in addition to claims of actual innocence of the offense as an excuse for procedural default. For this reason, although allowing a petitioner to present a claim of actual innocence of death may be necessary to prevent a "fundamental miscarriage of justice," the same is not true with respect to a claim of actual innocence of a penalty of a term of years.[3]

---

[3] In *Glover v. United States*, 531 U.S. 198 (2001), the Court held that a counsel's error which resulted in a mere six-month increase in the defendant's sentence constituted prejudice for Sixth Amendment purposes. That holding is in no way inconsistent with the well-established "death is different" jurisprudence, but merely applies standard Sixth Amendment ineffective assistance of counsel jurisprudence. *Cf Kimmelman*

Second, one of the core concerns discussed in section I(B), *supra*, for not extending the actual innocence exception to sentencing at all also explains why, if *Apprendi* and *Ring* are irrelevant to the analysis, the exception should not be extended from capital sentencing to noncapital sentencing. Extending the exception to noncapital sentencing would convert the exception from one applicable only in the "extraordinary case," *Carrier*, 477 U.S. at 496, to a common occurrence. Petitioners would be entitled to obtain relief on defaulted claims of sentencing error simply by recasting those claims as "actual innocence" of the sentence. This would seriously erode the cause and prejudice rule.

Further, in adopting a standard of actual innocence of eligibility for death, this Court satisfied its concern that the standard be "workable" even though claims regarding capital sentences are often presented on the eve of execution. *Sawyer*, 505 U.S. at 341, 345. The court of appeals below was seemingly influenced by this concern for workability, for it drew a distinction between allowing the use of the actual innocence exception for habitual offender sentencing but not for nonhabitual offender sentencing. This distinction makes no sense. The court of appeals reasoned that the line should be drawn at habitual offender sentencing because that line would be easy to apply and extending the exception further would conflict with the notion that the exception must be applied narrowly. Pet. App. 16a (citing *United States v.*

---

v. Morrison, 477 U.S. 365 (1986) (permitting habeas review of a Sixth Amendment claim premised on counsel's failure to pursue a Fourth Amendment issue even though Fourth Amendment claims are not themselves cognizable on habeas review).

Mikalajunas, 186 F.3d 490, 495 (4th Cir. 1999)). There is no relevant distinction, however, between habitual and nonhabitual offender sentencing, and this Court's actual innocence jurisprudence does not turn on the simple concept of ease of application.

The court of appeals also pointed to language in *Smith* to justify applying actual innocence beyond the capital sentencing context. Pet. App. 15a-16a. In *Smith*, Justice Stevens argued in dissent that a "fundamental fairness" inquiry should supplant the cause and prejudice requirement of *Wainwright* when a claim regarding sentencing is defaulted in a capital case. *Smith*, 477 U.S. at 545-46 (Stevens, J., dissenting). In response, the Court stated that "[w]e reject the suggestion that the principles of *Wainwright v. Sykes* apply differently *depending on the nature of the penalty* a State imposes for the violation of its criminal laws." *Smith*, 477 U.S. at 538 (emphasis added). Contrary to the lower court's reasoning, this passage from *Smith* was not intended to suggest that actual innocence of *any* available penalty can excuse default, but rather was intended to deflect the argument that the application of the cause and prejudice standard turns on the nature of the penalty imposed.

II. A Showing Of "Actual Innocence" Must Be Premised On Newly Discovered Evidence, A Standard Haley Cannot Meet.

Haley was convicted of theft of property valued less than $1500, which is ordinarily a Class A misdemeanor. But Haley's theft conviction was twice enhanced. To qualify for the second enhancement, Haley must have committed two prior felonies, and the second felony must have been committed after his

conviction for the first felony became final. *See* Tex. Penal Code §12.42(a)(2). Haley contends that he is innocent of the second enhancement because he committed attempted robbery, his second felony, on October 15, 1991, but he was not *convicted* of delivery of amphetamines, his first felony, until three days later, on October 18, 1991. Certified copies of documents from the department of corrections containing these relevant dates, found in what is commonly referred to as a "pen packet," were entered into evidence. J.A. 25, 42, 47, 76. Despite the fact that these dates show that Haley's prior convictions were not obtained in a sequential order, as required by the enhancement statute, the jury found Haley guilty of the enhancement and he was thereafter sentenced to a term of sixteen years imprisonment, instead of the maximum sentence of two years jail time that he would have received without the second enhancement. J.A. 24, 52-58, 61-62, 76.[4] Accordingly, Haley's claim of actual innocence is premised on information that was presented at trial, or of which he should have been aware at the time of trial. Settled precedent holds that a petitioner may not rely on such evidence to establish actual innocence.

Actual innocence claims must rest upon newly discovered evidence that was not presented at trial. In *Schlup*, this Court stated:

> [w]ithout any *new* evidence of innocence, even the existence of a concededly meritorious

---

[4] Texas law required that the prosecution prove respondent guilty of the enhancement beyond a reasonable doubt. *See* Tex. Penal Code §12.42; *Williams v. State*, 899 S.W.2d 13 (Tex. Ct. App. 1995).

> constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.

513 U.S. at 316 (emphasis added). A credible claim of actual innocence requires a habeas "petitioner to support his allegations of constitutional error with *new reliable evidence*—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—*that was not presented at trial.*" *Id.* at 324 (emphasis added). This standard was repeated in *Calderon v. Thompson*, 523 U.S. 538, 559 (1998). *See also Bousley v. United States*, 523 U.S. 614, 630 (1998) (Scalia, J., dissenting) (noting standard).

This Court has accepted Judge Friendly's assertion that a colorable showing of actual innocence premised on new evidence must include a consideration of all available evidence, with appropriate reliability considerations, including that which became available after the trial, that which was arguably wrongly excluded at trial, and that which was arguably wrongly included at trial. *Kuhlmann*, 477 U.S. at 454, n.17 (citing Friendly, J., 38 U. Chi. L. Rev. at 142); *Sawyer*, 505 U.S. at 339, n.5; *Schlup*, 513 U.S. at 322, n.37. There are two possible categories of "new" evidence—newly available evidence, and evidence that was available, but was wrongly excluded at trial on legal grounds. Neither Judge Friendly nor this Court suggested that a petitioner could show actual innocence solely by a review of the evidence presented at trial. Nor did Judge Friendly or this Court suggest that actual innocence could be established by evidence

that the petitioner, through due diligence, could have obtained at trial.

Moreover, allowing an actual innocence claim premised on "old" evidence would be inconsistent with the policy underpinnings of habeas jurisprudence. The States are entitled to finality in their criminal adjudications. *Carrier*, 477 U.S. at 486-87; *Thompson*, 523 U.S. at 556. Indeed, concern for finality is one of the reasons why this Court declined to find that an independent claim of actual innocence is cognizable on habeas review. *Herrera*, 506 U.S. at 404, 417. The federal courts also have a policy interest in limiting what evidence can be presented in support of habeas claims. Expanding the availability of habeas relief might require courts to "routinely . . . hold evidentiary hearings" which might "significantly increase the costs" to the system. *Carrier*, 477 U.S. at 487.

It would run contrary to these principles to allow a petitioner to rely belatedly on a factual claim that has been available to him throughout the litigation of his case.[5] In an analogous habeas context, this Court refused to allow a petitioner to pursue a successive habeas petition containing a "new" claim the factual basis of which was available to the petitioner at the time he filed his first petition. *McCleskey v. Zant*, 499 U.S. 467, 497-98 (1991); *see Sawyer*, 505 U.S. at 335, 338-40 (applying the same actual innocence standard

---

[5] Here, not only was the evidence of "actual innocence" available to Haley at his trial, it was used at his trial. This use of trial evidence directly conflicts with the practice of other lower courts in addressing actual innocence claims. *See Burks v. Dubois*, 55 F.3d 712, 718 (1st Cir. 1995) (trial evidence not new under *Schlup*); *Sweger v. Chesney*, 294 F.3d 506, 523, n.18 (3rd Cir. 2002) (same).

in allowing a petitioner to proceed on a second or successive petition as in allowing a petitioner to proceed with an otherwise defaulted claim). The Court in *Zant* was not persuaded that the petitioner should have been allowed to avoid the "abuse of the writ" doctrine because the claim was arguably stronger than it had been due to "new" evidence developed by the petitioner. 499 U.S. at 498. Nor did it matter, held the Court, that the new evidence arguably strengthened the claim—the petitioner should have conducted a reasonable and diligent investigation and included all of his claims in his first petition. *Id.*

Lest it be thought that habeas petitioners will rarely present "old" evidence to support claims of actual innocence, a recent decision from the Seventh Circuit proves otherwise. In *Gomez v. Jaimet*, No. 02-4372, 2003 WL 22805702 (7th Cir. Nov. 26, 2003), the court allowed a habeas petitioner to overcome procedural default on the basis of a claim of actual innocence premised on evidence that was *available* to the petitioner at trial—indeed, one piece of evidence was the petitioner's own proposed testimony—but was simply not *used* at trial. The Seventh Circuit's decision is plainly inconsistent with the principles of comity and finality at the base of habeas review and conflicts with the underlying principle of *McCleskey*.[6]

Finally, the changes made under the Antiterrorism and Effective Death Penalty Act strongly support the

[6] The Seventh Circuit's decision is also contrary to the approach of another circuit. *See Pickens v. Lockhart*, 4 F.3d 1446, 1450 (8th Cir. 1993) (knowledge which petitioner has had for years is not "new"); *Bannister v. Delo*, 100 F.3d 610, 618, n.6 (8th Cir. 1996) (petitioner's own statement is not new evidence).

proposition that only new evidence that was not otherwise available to a petitioner exercising due diligence can support a claim of actual innocence. Under 28 U.S.C. §2244(b)(2)(B)(i), a petitioner cannot proceed on a second or successive petition unless the factual predicate underlying his claim "could not have been discovered previously through the exercise of due diligence." This provision is not directly applicable to claims of actual innocence offered as an excuse for default, but it does provide guidance. *See Thompson*, 523 U.S. at 558 (even when AEDPA does not apply, it "informs" consideration of habeas claim). As noted, prior to the enactment of this statutory provision in 1996, the Court applied the same actual innocence standard in allowing a petitioner to proceed on a second or successive petition as it did in allowing a petitioner to proceed with an otherwise defaulted claim. *See Sawyer*, 505 U.S. at 335, 338-40. While Congress chose not to address any procedural default issues in the AEDPA, there is no reason why this Court should not continue to apply similar standards to actual innocence claims related to second or successive petitions and actual innocence claims related to procedural default. Because the second or successive petition provision requires new evidence in the sense of evidence that would not have been available to a petitioner had he exercised due diligence, the actual innocence exception to default should require the same.[7]

[7] In this case, the actual innocence claim is directly linked to the underlying claim for relief. The language of the Court's decisions suggests that such a link is mandatory. *See Sawyer*, 505 U.S. at 336; *Kuhlmann*, 477 U.S. at 455. Guidance on this point is again found in 28 U.S.C. §2244(b)(2)(B). Subsection (ii)

Petitioners who seek to rely on "old" evidence are not without recourse. A petitioner who wants to rely on evidence in the trial record should either challenge the sufficiency of the evidence directly, or bring an appropriate claim of ineffective assistance of counsel. Likewise, a petitioner who failed to use information that was available to him could bring a claim against counsel. This Court has made clear that the possibility of raising an ineffective assistance of counsel claim is an additional safeguard against the occurrence of a fundamental miscarriage of justice. *Carrier*, 477 U.S. at 496. A petition for clemency is also an available option. *See Herrera*, 506 U.S. at 417 (clemency is a safety valve against miscarriage of justice).

---

of the provision requires that the facts underlying the new habeas claim be sufficient to demonstrate that no reasonable factfinder would have found the petitioner guilty.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN
Solicitor General of Illinois
LINDA D. WOLOSHIN
* DOMENICA A. OSTERBERGER
Assistant Attorneys General
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-8812

Of Counsel:
Dan Schweitzer
National Association of
Attorneys General
750 First St., N.E., Suite 1100
Washington, D.C. 20002
(202) 326-6010

** Counsel of Record*

December 2003